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No. 77-1141

In the Supreme Court of the United States

OCTOBER TERM, 1977

WALTER E. HELLER & COMPANY,
Petitioner,

vs.

FIRST VIRGINIA BANKSHARES CORPORATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ALBERT E. JENNER, JR.
ROBERT L. BOMBAUGH
LELAND J. BADGER
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

JAMES E. CLARK
LONDON, YANCEY, CLARK & ALLEN
2100 First National Southern
Natural Building
Birmingham, Alabama 35203
(205) 251-2531
Attorneys for Petitioner Walter E. Heller & Company

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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This brief reply is necessitated by Respondent's efforts to confuse the two issues of law raised by the petition. Respondent states, "Heller would have this Court conduct a third factual review and analysis of a vast record generated by a jury trial lasting more than a month." (Respondent's Brief, at p. 8) Petitioner neither sought nor seeks any such thing. Under cover of its misstatement of Petitioner's position, Respondent presents an extended, irrelevant and inaccurate argumentative counterstatement of the facts, with a reply to which we will not burden this Court.

Petitioner's petition is predicated solely upon two important issues of law as to each of which there is no contested matter of fact. In each instance, the question is whether the Court of Appeals committed reversible error by failing to apply and follow a clear and leading decision of this Court, namely:

> 1. Did the Court of Appeals and the District Court fail to follow and apply *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) in permitting the jury to base its general verdict on an event that took place and was discovered by an employee of the Petitioner subsequent to the time a different employee of Petitioner had given favorable information as to one of its customers and upon which Respondent bottomed its claim of wrongdoing, it being uncontested that the employee involved in the subsequent event was wholly unaware of the fact that the other employee had theretofore communicated the allegedly incorrect favorable financial information?
>
> 2. Did the Court of Appeals fail to follow and apply *Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19 (1962) on a record that clearly reveals that the jury was permitted under the cloak of a general verdict to base that verdict on an erroneous instruction?

Contrary to Respondent's argument, Petitioner does not seek this Court to review and adjudicate the facts.

Petitioner's argument is solely that it has a right to have the facts decided by a jury that has proper evidence before it and that has been correctly instructed by the trial judge as to the applicable law.

I.

PETITIONER DID PRESERVE THE RECORD WITH RESPECT TO THE EXAMINATION REPORT

Despite the fact that the Court of Appeals ruled on the merits of the admissibility of Plt. Ex. WH-14, Respondent erroneously contends that Heller did not preserve its objection to that exhibit. Throughout the trial Heller's counsel objected to any evidence relating to events after May 24, 1972, the date of the Michelman call. (51:130-131). Heller's counsel objected to the admission of Plt. Ex. WH-14. Petitioner's counsel was faced with the fact that the document had some dates on it which preceded the date of the call. In the portion of the colloquy, which, unfortunately, is ignored by Respondent, Petitioner's counsel indicated he would subsequently present evidence to establish the irrelevance of the document because it was prepared weeks after the date (May 24, 1972) of the Michelman telephone inquiry. Subsequently, Petitioner's counsel sought a corrective instruction which, unfortunately, was denied by the trial court. The requested instruction was:

> "The Court charges the Jury that the only transaction between it or its agents and the defendant, Walter E. Heller & Company, upon which the plaintiff is entitled to base its claim of fraud against said defendant is the letter of May 24, 1972 from Charles Michelman to First Virginia Bankshares Corporation giving the plaintiff information contended to have been developed through Michelman's contact on the same day with Robert Abrahams of Walter E. Heller & Company." (34:138)

Interestingly, in Respondent's assertion that the "after acquired scienter" issue is raised for the first time in this Court, Respondent states "the district court predicated First Virginia's entire case against Heller upon the repre-

sentations made by Abrahams to Michelman on May 24, 1972. . ." But that is precisely what the refused instruction asked the Court to do.

It is true that the "after acquired scienter" issue was not briefed or argued prior to the Petitioner's filing of its petition for rehearing in the Court of Appeals. The simple reason for this is that the issue was raised for the first time by the Court of Appeals in its opinion (App. A, at pp. 14-15). The exhibit had not been offered for the purpose ascribed by the Court of Appeals. The Court of Appeals agreed with Heller's argument that it was irrelevant to show the state of Heller's knowledge at the time of the call but rationalized the introduction of this highly prejudicial document on the basis of a supposed subsequent duty to update the information previously given which the Court felt the *jury* might find. But that was not for the jury. It was a question of law for the trial judge.

II.

THE GENERAL VERDICT CANNOT STAND

Despite the opinion of the Court of Appeals that the trial court's scienter instruction "listed, without qualification, negligence as a possible basis of liability," (App. A, at p. 21) which the Court of Appeals held was error, Respondent contends that the trial court did not charge the jury on a negligence standard (Respondent's Brief, at p. 11). The alternate "should have been known by defendant (Defendant had means to discover and duty to investigate, either by position or grounds to suspect)" (App. A, at p. 7) is, as the Court of Appeals recognized, a classic formulation of a negligence standard. Respondent continues (erroneously, and contrary to *Sunkist*) to argue that this could not have influenced the jury. But, as this Court held in *Sunkist*, the general verdict cloaked whether

the jury did or did not so rely. It is sufficient that the erroneous instruction permitted it so to rely.

One need only look to the assertions in Respondent's so-called "Corrected statement of the Case" to see how this was and is used by Respondent to prejudice the issue:

> 1. "Heller is a large, established and substantial financial institution and recognized as such." (Respondent's Brief, at p. 4)
>
> 2. "First Virginia was cognizant of Heller's "fine reputation,' considered Heller an expert in the rediscount business, and recognized that Heller was making extensive loans to Benson Co. and holding a substantial part of Benson Co.'s assets as collateral for those loans." (Respondent's Brief, at pp. 4-5)
>
> 3. "Heller's reputation for expertise was most meaningful to First Virginia . . ." (Respondent's Brief, at p. 5)
>
> 4. "Heller was the largest and only secured creditor of Benson Co." (Respondent's Brief, at p. 5)
>
> 5. "The rediscount agreement which was the predicate of Heller's credit advances to Bensen Co. provided for and contemplated Heller's periodic and *intensive review* of Benson Co.'s records" (Emphasis Supplied, Respondent's Brief, at p. 5)
>
> 6. "Heller did, in fact, make periodic and detailed examinations of Benson Co." (Respondent's Brief, at p. 5)

The thrust of these statements is that because Heller is large and skillful and examined certain Benson records, it should have known of the fraud practiced by the Bensons. And this is precisely what the jury was improperly allowed to conclude because of the erroneous instructions, despite the fact that the trial court held that there was no evidence that Heller knew of the fraud practiced by the Ben-

sons against the Respondent. (See Petition at p. 12; 41:106-119).

The rule of *Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19 (1962) compels reversal so that a jury properly charged may adjudicate the facts.

CONCLUSION

We respectfully pray, for the reasons stated above and in Petitioner's original petition, that the petition should be granted.

Respectfully submitted,

ALBERT E. JENNER, JR.
ROBERT L. BOMBAUGH
LELAND J. BADGER

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

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